

No. 56725-3-II

IN THE COURT OF APPEALS
STATE OF WASHINGTON

DIVISION II

PETITIONER AMELIA BESOLA, individually,

Appellant,

v.

ERIC PULA, individually and as PERSONAL REPRESENTATIVE OF
THE ESTATE OF MARK L. BESOLA, and et al,

Respondents.

BRIEF OF RESPONDENT KELLY McGRAW

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ISSUES PERTAINING TO DECISION.....	2
III.	STATEMENT OF FACTS	3
IV.	ARGUMENT	10
A.	Standard of Review: Abuse of Discretion	10
B.	The trial court was well within its discretion in awarding the Respondent her attorneys' fees and costs	11
C.	The Court of Appeals should award attorneys' fees and costs to Respondent Kelly McGraw	20
V.	CONCLUSION	22

TABLE OF CONTENTS

CASES

<i>In re Estate of Black</i> , 153 Wn.2d 152, 173, 102 P.3d 796 (2009)	10
<i>In re Estate of Mower</i> , 193 Wn.App. 706, 727-28, 374 P.3d 180 (2016)	10
<i>In re Estate of Lowe</i> , 191 Wn.App. 216, 239, 361 P.3d 789 (2015)	11
<i>Weyerhaeuser v. Tacoma-Pierce County Health Dep't</i> , 123 Wn.App. 59, 65, 96 P.3d 460 (2004)	11

STATUTES

<i>RCW 11.96 et seq.</i>	10
<i>RCW 11.96A.150</i>	10, 11, 20
<i>RCW 11.96A.150(1)</i>	11, 12

RULES

<i>Washington State Civil Rule 11</i>	16, 19, 21
<i>RAP 18.1</i>	23

I. INTRODUCTION

Respondent Kelly McGraw (“Kelly”) has known the Petitioner, Amelia Besola (“Amelia”) and her now-deceased brother, Mark Besola, for decades. They were friends – until Kelly, unbeknownst to her and due to no fault of her own, was included as a beneficiary in what has been determined to be a false Will. When the Will surfaced, Amelia turned on Kelly, filing a civil action against Kelly despite a complete lack of evidence of wrongdoing, and then pursuing years of “scorched earth” litigation against Kelly, undaunted by the fact that there was not one shred of evidence linking Kelly to any wrongdoing.

Ultimately, the trial court judge recognized that Amelia’s claims against Kelly were meritless and dismissed all claims with prejudice. In a recognition of the legal fees incurred by Kelly in simply defending against Amelia’s unsubstantiated claims, the trial court judge granted Kelly her reasonable attorneys’ fees and costs, incurred in defending against the unsubstantiated claims brought by Amelia. Now, Amelia seeks to overturn the trial

court's well-articulated and supported decision. Amelia's appeal of the trial court judge's Order awarding attorneys' fees and costs to Kelly should be dismissed by the Court of Appeals, and Kelly should be awarded further fees related to this baseless appeal and the continued harassment by Amelia.

II. ISSUES PERTAINING TO DECISION

Whether, where the trial court awarded attorneys' fees and costs to Respondent Kelly McGraw well within its discretion and based upon the fact that Petitioner Amelia Besola filed and pursued claims against Respondent McGraw that had no evidentiary support and were baseless, and where Amelia Besola pursued those meritless claims against McGraw with years of "scorched earth" litigation, should the trial court's decision to award McGraw her attorneys' fees and costs be upheld? Yes.

Whether, when Petitioner Amelia Besola has no legal basis to appeal the trial court's Order of attorneys' fees and costs to Respondent Kelly McGraw, and where McGraw has been forced to incur further attorneys' fees and costs associated with

defending the spurious appeal, should respondent Kelly McGraw be granted further attorneys' fees and costs, specifically against the Petitioner, by the Court of Appeals for having to defend against this appeal? Yes.

III. STATEMENT OF FACTS

Kelly has known the Besola siblings for decades. Kelly first met Amelia when Kelly brought her pets to Amelia's veterinary clinic for care. When Amelia adopted a baby girl, Kelly and Amelia grew closer, developing a friendship. Over the years, Kelly took Amelia's daughter for outings, to movies and lunches. Amelia trusted Kelly with her daughter and had no issue with the developing relationship between Kelly and the child.

At one point, when Kelly was looking for a place to live, Amelia suggested that Kelly move in with Amelia's brother, Mark Besola, at his Lake Tapps house, noting that Kelly could help Mark recover from recent surgery. Amelia never advised Kelly that Mark had been convicted of child pornography or that another sex offender lived on the property with Mark. In fact,

Amelia intended to use Kelly and her proximity to Mark to gain information on Mark, who was only sporadically communicating directly with Amelia.

Kelly resided in a separate mother-in-law apartment adjacent to the main house where Mark lived and where Respondents Eric Pula, Brandon Gunwall and others later lived. After Kelly moved into the Lake Tapps house, she and Mark became close friends and Mark regularly confided in her about his anger and contempt for Amelia. He often talked about making a Will to disinherit Amelia. He even asked Kelly to marry him so that Amelia would not inherit his wealth; however, Kelly said no. At the time of Mark's death, Kelly had no idea whether a Will had been drafted or executed, or who benefitted from any such Will. Kelly believed that Mark would outlive her, and she never gave his estate any further thought.

Notably, immediately after Mark's death, Amelia turned against Kelly. She excluded Kelly from funeral planning for Mark or from attending the funeral. She initiated eviction

proceedings to remove Kelly from the Lake Tapps house, even though she was the reason Kelly was there. And, once the purported Will surfaced which named Kelly as a beneficiary, Amelia filed a Will Contest action, naming Kelly as a party and making serious claims against Kelly with regard to the drafting, procurement and execution of the December 6, 2018 Will – even though Amelia had absolutely no evidence whatsoever to support those claims. Amelia sued Kelly for fraud, financial exploitation, unduly influencing Mark Besola (presumably to create a Will that the Petitioner alleges Mark has nothing to do with), and even for the unauthorized practice of law – all with complete disregard for the fact that there was absolutely no evidence to support such claims against Kelly.

For nine months, Amelia was the Administrator of the Estate (from her appointment in January 2019 to her removal in September of 2019) and had unfettered access to the estate assets, documents, electronic devices and financial records. She had every opportunity to investigate thoroughly her claims against

Kelly. There can be no doubt that Amelia and her attorneys had to know early on that there was no basis for Amelia's claims against Kelly. Nonetheless, Amelia and her attorneys continued a "scorched earth" litigation against Kelly. Amelia hired a battery of attorneys (at least four different firms) and paid for yet another attorney to represent her sister, Julia Besola-Robinson, thereby giving herself another advocate against Kelly. Even though Julia Besola-Robinson is also a named beneficiary in Mark's 2018 Will, she has chosen to follow Amelia in lock-step, against Kelly. Amelia and her attorneys concocted a litigation strategy clearly designed and interposed for the improper purpose of harassing Kelly and her counsel and to cause a deliberate and needless increase in the cost of litigation. Joseph Vera, one of the Petitioner's attorneys, wrote the following on November 4th and 11th of 2019:

Remember—Pula and Gunwall may not show for the hearing—and this alone will have its own evidentiary weight. And, in the larger sense, the depositions are about litigation tempo and the opposing counsels' resource burn rate. We need to tie up their time so they can't make money on their other cases.

- Finally, we need to develop a plan if we fail completely at the Nov 14, 2019 hearing—if they are awarded the funds—can we stay, appeal, take steps to attach the funds with Writs of Attachment, or file wrongful death or conversion lawsuits to tie up or drain funds.

These quotes are just a few samples of the communication between Amelia's attorneys, plotting ways to stretch out the litigation and thin out their opposing counsel's resources to respond. This litigation strategy was formulated and deliberately continued in spite of the fact that Amelia, her sister Julia, and their counsel, all were aware and admitted that they could never meet their burden of proof as to Kelly.

Over the next year, Amelia failed to obtain any relevant admissible evidence against Kelly, as she grudgingly admitted in her deposition at the end of the summer of 2020. Yet, she continued to pursue her claims against Kelly. She even contacted Kelly's former husband from a marriage that ended a decade

earlier to solicit a Declaration from him that had no relevant facts with regard to Amelia's claims against Kelly but was designed to do nothing more than hurt and harass Kelly, specifically, by stirring up very painful memories. Amelia and her counsel produced more than 100,000 pages of irrelevant and/or inadmissible "evidence", often attaching hundreds and sometimes thousands of pages of irrelevant and/or inadmissible evidence to simple motions that Kelly and her counsel had to spend (or waste) countless hours reviewing. The "document dump" and Amelia's refusal to consolidate the two TEDRA Petitions that she filed are evidence of her and her attorneys' express strategy to make the litigation as time-consuming and expensive as possible for Kelly.

Amelia also drove up the litigation costs by failing to comply in good faith with discovery propounded to her. Eventually, the trial court had to issue an order of contempt as Amelia was not complying with discovery. During the three days of deposition, the Petitioner frequently refused to properly

answer simple questions which resulted in numerous threats to reach out to the Court for intervention. For more than a year, Amelia made claims against Kelly ranging from alleged drug-use, to drug-dealing, to avarice (even dragging Kelly's ex-spouse into the mix) – among other outlandish and unsubstantiated claims. In the meantime, Kelly, whose health is fragile, was forced to retain counsel and defend herself against the meritless claims, incurring nearly \$90,000 in attorneys' fees and costs. On December 11, 2020, after two continuances granted to Amelia, the Court heard and granted the Personal Representative's Motion for Partial Summary Judgment dismissing all claims against the Respondents, and granted Kelly's Joinder to said Motion, specifically dismissing all claims by Amelia against Kelly with regard to the TEDRA Will Contest Petition. Ultimately, after years of litigation, multiple depositions of Kelly, Amelia had nothing. She could not produce a single piece of evidence to show any wrongdoing by Kelly. The trial court recognized that Amelia had filed meritless claims, pursued a

“scorched earth” litigation approach against Kelly, and that Kelly was injured substantially as a result.

IV. ARGUMENT

A. Standard of Review: Abuse of Discretion

The applicable standard of review with regard to a trial court’s award of attorneys’ fees pursuant to the attorney fees provisions of the Trusts and Estate dispute Resolution Act (TEDRA) is abuse of discretion. *In re Estate of Mower*, 193 Wn.App. 706, 727-28, 374 P.3d 180 (2016); *In re Estate of Black*, 153 Wn.2d 152, 173, 102 P.3d 796 (2009). Under the attorney fees provisions of the TEDRA statute, RCW 11.96 *et seq.*, the trial court has discretion to award fees and other costs to any party in an estate dispute proceeding governed by Title 11 RCW. *See RCW 11.96A.150*. The court may award any amount it “determines to be equitable.” *See RCW 11.96A.150(1)*; *In re Estate of Mower*, 193 Wn.App. 706, 727-28, 374 P.3d 180 (2016). “In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and

appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.” *See RCW 11.96A.150 (emphasis added)*. A court abuses its discretion if it exercises it in a manner that is manifestly unreasonable, on untenable grounds, or for untenable reasons. *In re Estate of Lowe*, 191 Wn.App. 216, 239, 361 P.3d 789 (2015).

The appellate court views the evidence in the light most favorable to the prevailing party (in this case, Respondent McGraw, since the court dismissed the Petitioner’s claims against McGraw) and defers to the trial court regarding witness credibility and conflicting testimony. *Weyerhaeuser v. Tacoma-Pierce County Health Dep’t*, 123 Wn.App. 59, 65, 96 P.3d 460 (2004).

B. The trial court was well within its discretion in awarding the Respondent her attorneys’ fees and costs.

RCW 11.96A.150(1) provides:

The court may order the costs, including reasonable attorneys’ fees, to be paid in such amount and in such manner as the court determines to be

equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

See RCW 11.96A.150(1).

Prior to awarding Kelly her attorneys' fees and costs incurred in defending against Amelia's baseless claims, the trial court dismissed each and every claim brought by Amelia against Kelly – making Kelly the prevailing party with regard to Amelia's suit. *See CP 452-459.* In her brief, Amelia repeatedly claims she is the prevailing party, and although that may be true with regard to the issues related to the Will, it is not true concerning her claims against Kelly – those were dismissed summarily by the trial court for lack of evidence. Kelly is the prevailing party for the purposes of this appeal. *See CP 452-459.* Despite three years of “scorched earth” litigation pitting at least four law firms and seven lawyers against Kelly's solo practitioner, three separate depositions of Kelly, numerous

meritless discovery requests to Kelly, Amelia was never able to produce a shred of evidence of wrongdoing by Kelly. The trial court simply recognized this and the cost it resulted in for Kelly – nothing could be more reasonable.

The facts that this lengthy dispute disclosed were that, just like Amelia, Kelly was a victim. She was likely included in the false Will to add authenticity to it, because of her long and close friendship with Mark. Notably, Amelia's sister, Julia, was equally a victim – however, Amelia did not sue Julia for being a named beneficiary in the Will and accuse her of fraud and forging a Will. In fact, Amelia paid for Julia's attorneys' fees and costs throughout the lengthy litigation.

Amelia is critical of Kelly's defense of the 2018 Will, implying that, somehow, this suggests that Kelly was involved in its inception (again, there is no evidence of this). However, Kelly had a good faith basis to believe Mark may have executed a Will in December 2018 – as she repeatedly testified, Mark made a statement to her that month indicating that Amelia would never

get a penny of his wealth. Mark had even asked Kelly to marry him, solely to prevent (or make it more difficult) for Amelia to obtain his wealth. Furthermore, the Will included specific details that it appeared only Mark would know (addresses for his mother's burial place in Lopez Island, for example). Kelly's belief that the Will was real was not unfounded or unreasonable and certainly does not implicate her in any wrongdoing. After a fairly lengthy and acrimonious trial, even experts and the judge himself concluded the Will was authentic. After the trial, even Amelia's own attorney, Jose Vera, conceded in open court that Mark had likely signed the Will but that it had then been doctored. So, it was not unreasonable for Kelly to believe that the Will was authentic.

Ultimately, however, the award of attorneys' fees and costs to Kelly had nothing to do with whether the Will was false or authentic – it had to do with the fact that Amelia brought and pursued baseless claims against Kelly. Interestingly, Amelia fails in her brief to reference the judge's original order granting Kelly

attorneys' fees and costs, filed January 15, 2021. *See CP 467-472.* Notably, the trial court did reduce the amount of fees and costs requested, which suggests close examination and consideration before awarding the fees and costs. The Order, filed on January 15, 2021 included the following findings of fact: **“[t]he complexity of this matter and the “scorched earth” litigation tactics pursued by Petitioner Amelia Besola made it even more costly to litigate this matter and for Respondent Kelly McGraw to defend against the claims brought by the Petitioner.”** *See CP 470.*

The trial judge further found that:

The attorneys' fees and costs totaling \$89,502.48 incurred by Respondent Kelly McGraw to defend against the claims brought against her by the Petitioner, **which claims were found by the Court to be meritless**, are reasonable and necessary and are fair and reasonable both in terms of hours spent and in terms of the hourly rate.

See id.

The record makes it clear that the trial judge awarded Kelly her attorneys' fees and costs as a result of the meritless nature of the claims against which she was forced to defend – claims brought by Amelia in violation of Civil Rule 11 and without any evidentiary support. Such a basis is absolutely within the trial court's discretion and should be respected by the Court of Appeals.

After a second trial, in which the same trial judge determined that the December 2018 Will was not authentic, Amelia challenged the trial judge's award of attorneys' fees and costs to Kelly. If the attorneys' fees award had been based in any way upon the authenticity of the Will or wrongdoing by Kelly, it is likely the trial judge would have reconsidered whether an award of attorneys' fees and costs to Kelly was appropriate at that point. However, despite having changed his mind about the Will itself, the trial judge did not change his mind about awarding Kelly her fees and costs, nor did he change the fact that Amelia is liable for said fees and costs. The judge noted on the record

that “all the horrible things that [were] said about Ms. McGraw in the course of all this stuff . . . turned out to be not true.” *See VRP, page 9, lines 16-18.* The judge went on to say:

The issue is whether or not Dr. Amelia Besola’s claims with respect to all of those matters justified an award of attorneys’ fees to the prevailing parties. With respect to Ms. McGraw in particular, I think that’s true. The fraud that was ultimately discovered had nothing to do with Kelly McGraw.

See VRP, page 9, lines 20-24.

Even at the February 4, 2022 hearing, Amelia’s counsel continued to propagate, without basis or support, the myth that Kelly was somehow involved in wrongdoing. Attorney Andrea Brewer, of Smith Alling, stated:

And Ms. McGraw being in her unique position where she was occupying the house, she was there during the December time period that was relevant to all of this. She was there afterwards.

See VRP, page 10, lines 23-25; page 11, line 1.

The trial judge responded:

Sure. But as it turns out, there was essentially no evidence that she did any of those things So it turns out not only did she not do it, she couldn't have done it; and, yet, here she's left with all these legal fees.

See VRP, page 11, lines 2-8.

Ultimately, the trial judge agreed to make Respondent Eric Pula jointly liable for Kelly's fees and costs, but he refused to vacate the award. *See VRP, page 12, lines 1-3.*

As Amelia notes on page 19 of her brief, one reason to award fees and costs is to put a party back into the same position it would have been but for the litigation involved. Here, Kelly incurred nearly \$90,000 in fees and costs – a crippling amount for an individual to absorb – solely because Amelia targeted Kelly in a vicious, meritless battle in court. The award here is an attempt to put Kelly in a position she would have been in had Amelia not done so. Kelly prevailed on the claims brought by Amelia; however, the legal fees and costs incurred by her in

doing so were not equitable. The trial court judge recognized this and recognized that Amelia should not have pursued baseless claims to the degree she did. Had she taken a reasonable approach and dismissed the claims when it became apparent that there was no evidentiary support for the claims, the judge likely would not have awarded fees. But, even at the February 4, 2022 hearing, Amelia and her attorneys were still implicating Kelly without evidence, trying to draw inferences that simply are not there.

Amelia states that “the trial court assessed attorney fees against a successful Will Contestant to pay an unsuccessful will contestant her attorney’s fees.” *See Page 19, Petitioner’s Brief*. This is not the case. In fact, the trial court assessed attorney fees to the prevailing party (Kelly) against a party that violated Civil Rule 11 and relentlessly with callous disregard for the result pursued meritless claims.

Amelia argues that there is insufficient reasoning for the Court of Appeals to assess if the trial court based its decision to

hold Amelia liable for Kelly's fees and costs upon tenable grounds. Nothing could be further from the truth: the record is clear. The trial court based its decision to award Kelly her attorneys' fees and costs based upon the fact that Amelia brought and pursued baseless claims against Kelly, which claims were untrue. The trial court judge literally says this himself. This basis for awarding attorneys' fees and costs under RCW 11.96A is well within the trial court's discretion. As such, the Court of Appeals cannot deny the trial court's its discretion in this regard, and the trial court's decision should be affirmed.

C. The Court of Appeals should award attorneys' fees and costs to Respondent Kelly McGraw.

This appeal never should have happened. Amelia should have dismissed her claims against Kelly when it became obvious, years ago, that Kelly had done nothing wrong. However, Amelia failed to recognize the fact that Kelly did nothing wrong and, largely for spite, pursued her baseless claims. The trial court recognized the harm this did to Kelly, and has ordered that

Amelia be liable for the enormous attorneys' fees and costs incurred by Kelly. In response, Amelia filed a baseless appeal, where it is clear to even the most rudimentary legal scholar that the trial court judge acted well within his discretion in awarding the attorneys' fees and costs in question.

Kelly has, once again, been forced to incur attorneys' fees and costs in responding to this appeal. She has been established to be the prevailing party and all of Amelia's claims against Kelly have been dismissed with prejudice. Amelia is not seeking review of that dismissal of claims – they have been dismissed and Kelly is the prevailing party. The award of fees and costs to Kelly are based upon Amelia's own actions and failure to act in good faith, as is required by Rule 11 and elsewhere under the law. Once again, she continues to harass Kelly without a basis for doing so. It would be appropriate for the Court of Appeals to make an award of attorneys' fees and costs to Kelly, in light of Amelia's continued behavior. A request for an award of attorneys' fees and costs is hereby made.

V. CONCLUSION

The trial court judge recognized that Amelia was litigating against Kelly without basis, in bad faith, and that there were real consequences for those actions. The trial court judge recognized the harm that occurs when a litigant refused to act in good faith and comply with the simple tenements of Civil Rule 11 – do not pursue legal claims without evidentiary basis to do so. The trial court judge’s award to Kelly of her attorneys’ fees and costs was well within the trial court judge’s discretion and was a supremely reasonable and supportable decision. The trial court judge’s decision should be affirmed by this Court. Furthermore, the Court should award Respondent Kelly McGraw attorneys’ fees on appeal pursuant to RAP 18.1.

DATED this 19th day of July, 2022.

Respectfully submitted,

LAW OFFICE OF
ELIZABETH THOMPSON

A handwritten signature in black ink that reads "Elizabeth Thompson" followed by a horizontal line.

Elizabeth Thompson,
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CERTIFICATE OF WORD COUNT

The undersigned certifies that the foregoing Brief is 14 point, New Times Roman font and contains 3,740 words.

Dated this 19th day of July, 2022 at Asheville, Buncombe County, North Carolina.

A handwritten signature in black ink that reads "Elizabeth Thompson". The signature is written in a cursive style with a long horizontal line extending from the end of the name.

Elizabeth Thompson,
WSBA No. 32222

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

I am an attorney and owner of the Law Office of Elizabeth Thompson, PLLC.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the 19th day of July, 2022, I served in the manner noted the document(s) entitled Respondent Kelly McGraw's Response to Appellant's Opening Brief on the following person(s):

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DATED this 19th day of July, 2020 at Asheville, Buncombe County, North Carolina.

LAW OFFICE OF
ELIZABETH THOMPSON PLLC



Elizabeth Thompson